No. 583

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1923.

In the Matter

of

EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus,

Petitioners,

—against—

JOHN T. DELANEY, as Commissioner of Docks of The City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

Conflicting decisions. Change of state law, a rule of property, upon which petitioners and their predecessors relied. Taking of property without compensation, impairment of obligation of contract and denial of equal protection of the law. Ruling, upon assumed facts without evidence to support same, and contrary to admitted facts. Important questions affecting title to and rights in submerged lands.

BANTON MOORE,
Attorney for Petitioners.

CHARLES HENRY BUTLER,
Counsel for Petitioners.

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—against—

JOHN T. DELANEY, as Commissioner of Docks of The City of New York,

Respondents.

Sir:

PLEASE TAKE NOTICE, that at the opening of the Supreme Court of the United States on Monday, October 1, 1923 (or as soon thereafter as counsel can be heard), I shall present to the Court the annexed petition for a writ of certiorari to review a decision and decree of the Court of Appeals of the State of New York, and the orders entered thereupon in the above entitled proceeding, a copy of such petition, and brief in support thereof, being hereby served upon you.

New York, August 25, 1923.

BANTON MOORE,
Attorney for Petitioners,
110 William Street,
New York, N. Y.

To:

GEORGE P. NICHOLSON, ESQ.,
Corporation Counsel,
Attorney for City of New York.

IN THE

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EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus,

Petitioners,

—against—

JOHN T. DELANEY, as Commissioner of Docks of The City of New York,

Respondents.

Petition of plaintiffs for a writ of certiorari to review a decision of the Court of Appeals of the State of New York.

To the Honorable the Supreme Court of the United States:

I. The facts in this proceeding are the same as in *Applyby* v. *City*, herewith submitted. This cause arose in Special Term of Supreme Court, New York County, upon an application for peremptory writ of mandamus. The order of Special Term, denying the writ (fols. 7-11) was reversed and writ granted by the Appellate Division of the Supreme Court (fol. 215). The Court of Appeals by final order reversed the Appellate Division and affirmed the order of Special Term, and denied an application for reargument.

II. The Court of Appeals affirmed the judgment of the Appellate Division in the action of *Appleby* v. *City of New York*, which held that

petitioners could fill in and improve that portion of their property herein involved, at their pleasure, and without the consent of the City of New York (Par. 28 of Judgment, fol. 1652 of Record in said case). In this proceeding the said Court on the same day and upon the same state of facts, holds the opposite (235 N. Y. 364 at p. 376), basing its decision upon a supposed city ordinance not in evidence, but hereinafter referred to, which was claimed to prevent petitioners from using their property until permitted by the common council. The ruling was made as a matter of right and not in the exercise of discretion (fol. 11). An application for a rehearing was denied June 4, 1923, by order entered June 13, 1923.

III. The ruling herein is not only contrary to the said judgment, but is contrary to a line of cases in the said Court of Appeals, construing the same clause in like deeds from the City, which cases established a rule of property upon which petitioners and their predecessors in title relied.

IV. That the said change of law impairs the obligation of their contract, takes their property rights without compensation, and confiscates the money paid for the deeds and taxes.

V. That petitioners are successors of "all the right and title of the people of the state" (Ch. 182 of Laws of 1837) to "certain water lot(s) or vacant ground and soil under water to be made land" (fols. 111, 140), and entitled to improve their property. The ruling herein to the contrary is of broad public interest, certainly in the State of New York, if not in other states, and is very vital to the ownership of the property involved herein.

VI. That petitioners prepared plans to fill in their property inside the Federal bulkhead line of 1890, 150 feet west of and parallel with 12th Avenue, and of course inside the bulkhead line shown in their deeds, and applied to the Commissioner of Docks for approval of the plans and a permit to do the work. However, the City had adopted a plan for improvement of the property itself and contemplated acquiring title thereto to carry out said plan, which, as amended in 1916, provided that the bulkhead line should be only 50 feet west of 12th Avenue or 100 feet inshore of the Federal line.

The said Commissioner denied the application "on account of the fact that the proposed construction is not in accordance with the new plan" (fol. 104), and opposed this proceeding on the ground that he was "without power to grant such application, for the reason that the carrying out thereof would be in violation of law" (fol. 193).

This defense was overruled by the Appellate Division and by the Court of Appeals which held "that the rights of the relators (petitioners) are not limited by this bulkhead line (City line of 1916) but only by the line established by the Secretary of War." 235 N. Y. 364, 365.

As petitioners' proposed improvement is entirely consistent with Federal harbor lines and as the aforesaid defense was overruled, the application should have been granted.

But the City cited an obsolete ordinance in its Court of Appeals brief, which had not been pleaded and should not have been read on argument. And said Court, contrary to the facts of the case and contrary to the settled law, set forth in the annexed brief, held that the petitioners'

lands "may not be filled in without the approval of the City authorities."

VII. The Court of Appeals ruling is unreasonable, impairs a contract, intervenes petitioners' constitutional rights, and amounts to a taking without compensation.

VIII. For the reasons set forth in said brief, your petitioners submit that the Court of Appeals ruling is contrary to law. Although a writ of error has been granted herein, petitioners are advised by counsel to present this petition out of greater caution, and pray in the alternative, either (1) that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Clerk of the Supreme Court, New York County, commanding him to certify and send to this Court on a day certain to be designated in the writ, a full and complete transcript of the record and of all proceedings of said Court of Appeals of the State of New York in this proceeding, to the end that the same may be reviewed and determined in this Court as provided in Section 237 of the Act of Congress known as the Judicial Code, and the said final decree of the said Court of Appeals in this proceeding and every part thereof may be reversed by this Honorable Court and the proceeding remanded with directions to grant the application prayed for in the petition, or (2) that consideration of this petition be deferred until the hearing on the writ of error; and your petitioners pray for such other and further relief as may be just and equitable.

Dated, August 25, 1923.

EDGAR S. APPLEBY and
JOHN S. APPLEBY,
Petitioners.

CHARLES HENRY BUTLER,
Counsel for Petitioner.

State of New York,
County of New York—ss.:

EDGAR S. APPLEBY being duly sworn, says: That he is one of the petitioners herein, united in interest and pleading together with said John S. Appleby, the other petitioner. That he has read the foregoing petition, and that the same is true and correct to the best of his knowledge, information and belief.

EDGAR S. APPLEBY.

Sworn to before me this
25th day of August, 1923.

AUGUST A. FINK,
Notary Public, Kings Co. No. 96.
New York Co. Clerk's No. 226.
Term expires March 30, 1924.

I, CHARLES HENRY BUTLER, attorney and counselor at law duly admitted to practice in this Court do hereby certify that I have examined the foregoing petition for writ of certiorari; that although a writ of error has been allowed, the true scope and extent of the authority therefore is doubtful, rendering the petition for certiorari necessary for the proper protection of my clients' rights in the premises; that the petition is not made for delay, but is meritorious and well founded in law and ought therefore be granted.

Dated, August 25, 1923.

CHARLES HENRY BUTLER,
Counsel for Petitioners.

SUPREME COURT
OF THE UNITED STATES.

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In the Matter

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EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus,

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—against—

JOHN T. DELANEY, as Commissioner of Docks of The City of New York,

Respondents.

BRIEF IN SUPPORT OF PETITION.

I. Obligation of contract impaired by conflicting decisions and change of State law.

The State of New York by Ch. 182 of the Laws of 1837 (Schedule E) (1) established 13th Avenue as the "permanent" exterior avenue along the Hudson River, (2) extended and established all interior streets out to 13th Avenue, (3) vested in the City of New York "all the right and title of the people" of the State to the lands under water inside said permanent ripa, and (4) gave the riparian owners the pre-emptive right of grant from the City.

Said act has been held constitutional and a proper exercise of State power.

Said act formed an integral part of the contract expressed in the two deeds (Schedules F & G), from said City to petitioners' predecessors in title. The deeds are similar to other deeds from said City along the Hudson River. The object of the deeds was to raise money and to

improve the water front, the shore line being irregular and separated from the channel by tide water flats.

The deeds gave specific rights which the Court now says were withheld by an ordinance. It is unreasonable to assume that money would be paid for property which could not be enjoyed except by permission.

The deeds dated 1852 and 1853, respectively, set forth a consideration of $6,369.37 (fol. 110) and $4,937.50 respectively and conveyed "All that certain water lot or vacant ground and soil under water to be made land" etc. bounded and described by metes and bounds along said *established* streets, with certain wharfage rights, etc. The land in the streets was reserved for highway purposes forever and the wharfage at the *end* of the streets, to wit, the westerly side of 13th Avenue, was excepted.

The deeds contained mutual covenants, particularly that the grantee would build or erect the streets and avenues when requested, or permitted, but there are no covenants as to making the lands or improving the intervening spaces between the streets and avenues, that is, the lands conveyed. So held in *Duryea* v. *Mayor*, 62 N. Y. 592, same case 96 N. Y. 477, which has always been considered as conclusively settling the law on the question, as shown by later cases citing it with approval, such as *Mayor* v. *Law*, 125 N. Y. 380, at page 390 and again at page 391 where the Court said:

> "The grantee became the absolute owner of the land between the streets—the land granted, and that he could fill up whenever he chose, suiting his own pleasure as to the time and manner of doing it, but there was nothing in the grant binding him to fill it up. *Duryea* v. *Mayor, supra.*"

The Court passed upon identical language in the deed in the *American Ice Company* cases, and held that piers in streets could be rendered worthless as piers at any time "by the filling in of the land as far westerly as Thirteenth Avenue." 193 N. Y. 503, at p. 519, 217 N. Y. 402, at p. 420.

Therefore, "the Court is" not "free to interpret the clause" contrary to previous interpretations aforesaid, which were according to its true meaning and reasonable. The power of the Court of Appeals to change or modify its decisions "cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States," *Muhlker* v. *N. Y. & Harlem R. R. Co.*, 197 U. S. 544, 570.

The petitioners have such rights, affirmed by said previous decisions, which are clearly binding on the Court.

In the *Duryea* case (62 N. Y. 592) the Court of Appeals determined that there were no conditions in the deed as to the making of the lands between the streets, and affirmed this doctrine in same case, 96 N. Y. 477, where the Court further said that the deed "purported to give immediate possession of the property conveyed" (p. 486) and that the covenant as to making land applied only to streets, wharves and avenues, and not to the "intermediate spaces between the several streets and avenues therein described" (p. 488) and also said as to the Sinking Fund Ordinance of 1844 that a later "ordinance (1856) purports to establish a map, plan and new exterior water

line on its *easterly* side for the City of New York" and that the avenues and "streets be continued" * * * "by a prolongation of the lines of such avenues and streets" (p. 489). This is on all fours with the present case, except that by Ch. 182 of the Laws of 1837, the Legislature (which is a paramount to the Sinking Fund or Common Council (p. 489), established the map and water line, and directed that the streets and avenues be "continued," "by prolongation," on the *westerly* side of the City, instead of the easterly side. The City ordinance could not override the mandate of the legislature and it was not as intended.

The Court in the *Duryea* case, 96 N. Y. 477, further said that it could not adopt terms which "lead to manifest injustice and involve an absurdity" (bottom of p. 495), but would give "effect to the language used as will accomplish the obvious intent," and that "if it *be held* that the words 'make lands in conformity thereto' as used in the ordinance, apply *only* to the lands necessary to form the piers, bulkheads and streets, the defendant will not only be protected in all of the rights intended to be secured to it, but the grantee will receive the benefits of his purchase and the deed will be free from objection on account of the apparent repugnancy existing between the interests actually conveyed and those apparently reserved," and that the City's contention is "inconceivable" etc. (p. 496).

There can be no mistake as to this clear ruling in 96 N. Y. 477, or its continued repetition and affirmance in the later cases aforesaid. *Mayor v. Law*, 125 N. Y. 380; *Matter of City of New York*, 193 N. Y. 503, 519; *American Ice Co. v. City of New York*, 217 N. Y. 402, 420.

The Court was bound therefore to adhere to the "reasonable" interpretation of said clause

according to its "true meaning" which does not lead to "injustice" and "involve an absurdity," because petitioners and their predecessors relied thereon, in payment for deeds and $74,426.01 in taxes upon the property involved herein.

The City must have understood the true meaning of the clause, else it would not have ignored it in the lower courts.

The property and rights acquired by the deeds and confirmed by the courts come under the protection of Article I, Section 10, Part 1, of the Constitution of the United States, known as the contract clause, and the XIVth Amendment of the Constitution, against taking property without due process of law or without compensation and affording equal protection of the laws (fol. 30).

II. The ruling is based on assumed facts without evidence to support same, and is contrary to admitted facts.

In reference to Section 15 of Title 4 of the Sinking Fund Ordinance of 1811, the Court assumed

1. that the ordinance had been pleaded and was still in force;
2. that it is correctly quoted;
3. that it effected the land granted;
4. that it is paramount to the Legislature;
5. that no permission was given or waived;
6. that the streets have *not* been constructed.

First: the ordinance is not pleaded. It was not before the Court. "It is entirely plain that the" City ordinance "cannot, upon any legal ground, be read upon the argument." *Porter* v. *Waring*, 69 N. Y. 250, 256.

Sections 11 and 17 are as material as Section 15, if the ordinance is material at all. The "common council" referred to no longer exists. The Croton Water debt may be redeemed. The ordinance may no longer be in force (Section 5, Ch. 225, Laws of 1845).

Second: the text in the Court's opinion herein, differs from that in 96 N. Y. 486, and is incorrect. "Therewith" is different from "thereto." Also a reading of the entire ordinance with this correction would have prevented the misinterpretation.

Third: the ordinance did not effect the land granted as shown in all previous rulings of said Court (Point I), which in equity cases, without a jury, constitute a finding of fact, which this Court will review. *Jones National Bank* v. *Yates*, 240 U. S. 541; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560.

Fourth: the Legislature is paramount to the Sinking Fund Commission. The Legislature directed that the streets be "established, continued and extended." Ch. 182 of the Laws of 1837. This "legislative command" has been construed by the Court as an "immediate application of such lands for that purpose." *Knickerbocker Ice Co.* v. *42nd St. Ry. Co.*, 176 N. Y. 408; *Duryea* cases, *supra*, and many others

Fifth: (a) "Permission" was given by express words in the deed which purported to give immediate possession.

(b) Permission was also waived by the City usurping the grantee's right to build the streets

and erecting them itself upon piles. It is stipulated that the City has built piers in the streets (fol. 201). Such are pier streets according to the contract in the deeds and the decisions of the Court of Appeals. *City of Buffalo* v. *D., L. & W. R. R. Co.*, 190 N. Y. 84, 89.

(c) There is no evidence that any one ever applied for permission in like case. On the contrary the City has watched the filling going on for a century without ever making protest. *Furman* v. *Mayor*, 5 Sand (N. Y.) 16 aff. 10 N. Y. 567; *Langdon* v. *Mayor*, 93 N. Y. 129; *Williams* v. *Mayor*, 105 N. Y. 418, and many others.

Sixth: The streets have been constructed as aforesaid. If, as the Court says herein (235 N. Y. at p. 267) "The interest of both parties, as well as the general public require that the building of streets and the filling of lands should proceed simultaneously," then the application should be granted, because petitioners' plan and of improving their property is precisely the same as the pier streets which are stipulated to have been constructed (fol. 201).

CONCLUSION.

By reason of the errors and rulings aforesaid:

1. petitioners' contract with the City of New York, based on Ch. 182 of the Laws of 1837, set forth in the deeds, confirmed by many decisions of highest authority upon which they relied, has been violated in direct contravention of Article I, Section 10, Part 1 of the Constitution of the United States, known as the contract clause of the Constitution, and

2. their property and property rights are taken without compensation, including the sum of $74,426.01 paid to said City for taxes, all in direct violation of the XIVth amendment of the Constitution of the United States.

That the retaking by the City is directly for the purpose of greater monetary gain, as is shown by the City's use of the petitioners' property for slips and basins, under a definite plan, from which it receives great revenue, which petitioners alleged in their petition, violates their constitutional rights (fols. 30-31).

WHEREFORE, petitioners pray in the alternative:

(1) that a writ of certiorari issue forthwith: or

(2) that as a writ of error has been granted herein, that the consideration of this petition be deferred until the hearing on the error.

Dated, August 20, 1923.

Respectfully submitted,

BAXTON MOORE,
Attorney for Petitioners,
Office & P. O. Address,
110 William Street,
Borough of Manhattan,
City of New York.

CHARLES HENRY BUTLER, ESQ.,
Of Counsel for Petitioners.

APPENDIX.

Opinion of the Court of Appeal per Mr. Justice Pound.

In the Matter of the Application of EDGAR S. APPLEBY, *et al.*, for a Peremptory Writ of Mandamus, Appellants and Respondents, against JOHN H. DELANEY, as Commissioner of Docks of the City of New York, Respondent and Appellant.

CROSS-APPEALS from order of Appellate Division, First Department, reversing an order of Special Term which denied plaintiffs' motion for a peremptory mandamus requiring the defendant to approve certain dock plans and granting the application.

BANTON MOORE, for Relators, Appellants and Respondents.

JOHN P. O'BRIEN, Corporation Counsel (Charles H. Nehrbas, of counsel), for Defendant, Respondent and Appellant.

POUND, *J.*:

Relators seek to compel the commissioner of docks to approve permits for the filling in of lands under water.

The facts herein are substantially the same as in *Appleby* v. *City of New York*, decided herewith, with this difference: The city established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth

Avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the Secretary of War. The court below decided herein that a writ of peremptory mandamus should issue unless condemnation proceedings were instituted to acquire relators' property and property rights within such line. (199 App. Div. 552.)

We held in the action that the title of relators to lands actually under water is subject to the rights of the city to improve the same for the purposes of navigation but that the city must reacquire the property rights which it has conveyed before it can carry out its plans for such improvement.

This application should not, however, be granted. Section 15 of Title 4 of the sinking fund ordinance of 1844, referred to in the opinion in the action, provides:

> "No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

The water grants under which relators hold title also provide:

> "And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will

not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part or their successors or assigns first had for that purpose."

In *Duryea* v. *Mayor, etc.* (62 N. Y. 592), it was said that a similar clause did not limit the right of the owners to fill the space between the streets, but on a subsequent appeal (*Duryea* v. *Mayor, etc.*, 96 N. Y. 477), it was said that the provisions of the sinking fund ordinance had not been called to the Court's attention on the first appeal and it was held that the council had given its consent. We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The interest of both parties, as well as of the general public, requires that the building of the streets and the filling of the lands should proceed simultaneously, otherwise the filled in lands would be islands intersected by canals. The lands are

thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers, and to make land in conformity with relators grants implies the right to withhold such permission.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this Court and in the Appellate Division.

Hiscock, Ch. J., Hogan, Cardozo, McLaughlin, Crane and Andrews, J. J., concur.

Order accordingly.

(3)

IN THE

Supreme Court of the United States.

October Term, 1925.

No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,
Plaintiffs in Error,

—against—

JOHN T. DELANEY, as Commissioner of Docks of the City of New York,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

The brief for plaintiffs in error in this proceeding is contained in the brief in the case of EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors, etc., vs. THE CITY OF NEW YORK, argued herewith.

CHARLES E. HUGHES,
BANTON MOORE,
Of Counsel.